(3)

No. 89-9

In the Supreme Court of the United States

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October Term, 1989

HAMMER DeROBURT,

Petitioner,

v.

GANNETT COMPANY, INC., a Delaware corporation, and GUAM PUBLICATIONS, INC., a Hawaii corporation, both doing business as "PACIFIC DAILY NEWS,"

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Hammer DeRoburt respectfully replies to the "brief in opposition" filed by the defendants in response to his pending petition for a writ of certiorari. The main argument advanced by the opposition brief is that petitioner "waived" any right to assert the contentions that he now makes in this court. It is respectfully submitted that this "waiver" argument is legally untenable.

I.

This Court Unquestionably Has Jurisdiction to Overturn or Modify the "Actual Malice" Rule of *New York Times*, and Should Do So, in Order to Protect the Reputations of Innocent Individuals.

Citing cases such as *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970), and *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), the defendants argue that this court should not reconsider or modify the holding of *New York Times v. Sullivan*, 376 U.S. 254 (1964), because the plaintiff never challenged *New York Times* in the lower courts. It is, of course, generally true that this court ordinarily does not consider legal issues that were neither raised nor considered below. The general rule appears to be based on considerations of fairness to lower court judges and opposing parties, since trial courts should be given the opportunity to avoid error, since other parties should be allowed to respond to new legal contentions, and because legal issues should be decided at the first available opportunity. However, there are many exceptions to the general rule, at least one of which is applicable here. It would have been a futile and idle act for the plaintiff to have requested the district court, or the Ninth Circuit, to overrule *New York Times* or modify its holding.

In *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58 (1988), the defendant, in a petition for review, asked the California Supreme Court to overrule one of its own earlier decisions. The dissenters in *Moradi-Shalal* suggested that the state Supreme Court could not do so, since the defendant "did not raise the issue in the lower courts." 46 Cal.3d at 292, fn. 1. Nonetheless, the *Moradi-Shalal* majority held that "clearly it was pointless for defendant to ask either the trial or [intermediate] appellate court to overrule one of our decisions," and determined that the question of overruling the earlier decision was "properly" before the court, since

"[t]he original petition for review squarely raised the point." 46 Cal.3d at 292, fn. 1.

The reasoning of *Moradi-Shalal* is applicable to federal courts. A federal appellate court will consider an issue raised for the first time on appeal "when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice." *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976). See also, *Stahmann Farms, Inc. v. United States*, 624 F.2d 958, 961 (10th Cir. 1980); *Denis v. Liberty Mutual Insurance Company*, 791 F.2d 846, 849 (11th Cir. 1986); and *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975).

The broad discretion available to federal appellate courts to consider issues not raised in lower courts is illustrated by cases such as *Singleton v. Wulff*, 428 U.S. 106 (1976), and *Youakim v. Miller*, 425 U.S. 231 (1976). In *Youakim*, for example, this court noted that the general rule requiring litigants to raise issues in lower courts is relaxed where the claim of the appellant would clearly have been rejected had it been made at the trial court level. 425 U.S. at 235.

In *Carlson v. Green*, 446 U.S. 14 (1980), this court decided an issue that was presented in a petition for a writ of certiorari, even though it had not been presented either at the district court level or in the court of appeals, because the issue was an important and recurring one, where the interests of judicial administration were served by addressing it on the merits. Moreover, the question of modifying a precedent established by the Supreme Court itself is peculiarly within the province of the Supreme Court. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 (1971). In the *Blonder* case, remarkably, the request for modification of the earlier precedent was not even presented until the time of oral argument. 402 U.S. at 319. Nonetheless, this court, in *Blonder*, proceeded to overrule, in part, one of its own earlier decisions.

In their opposition brief, the defendants argue that "petitioner consciously embraced the actual malice standard

as part of a deliberate trial strategy" (p. 5), thereby, so the argument goes, "waiving" the right to ask that *New York Times* be overturned or modified. This argument is wholly unsound.

The plaintiff never "embraced" the "actual malice" rule of *New York Times*, but rather the district court specifically held against him, and determined that the rule would apply, when it made its choice of law ruling, in *DeRoburt v. Gannett Company, Inc.*, 83 F.R.D. 574 (D.Haw. 1979). It would have been utterly futile for the plaintiff at the time of trial, six years later, to ask the district court to overturn or modify a decision of the Supreme Court of the United States, which it had specifically found applicable.

In their brief, the defendants make little effort to defend *New York Times* on the merits. Furthermore, they do not deny that they withheld, concealed, and destroyed evidence on the issue of "actual malice." They offer no reason why the defendant in a defamation action, relying on the defendant's own state of mind, should not have the burden of proof with respect to that state of mind.

Interestingly, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this court relied heavily on a state court decision in which the principle formulated as "actual malice" had been recognized as a *defense*, the case of *Coleman v. MacLennan*, 98 P. 281 (1908). In the *Coleman* case, relying in part on the state constitutional guarantee of freedom of the press, the Supreme Court of Kansas upheld a judgment in favor of a defendant that was based on a qualified privilege on the part of a newspaper to communicate information on matters of public interest concerning a candidate for public office. This privilege of "good faith" was characterized as the "first defense" of the press. 98 P. at 281.

In *New York Times*, this court could have reached the same result as it did, simply by holding that, as a matter of law, the "good faith" privilege of the press, as defined in *Coleman* and in many other cases, represented a

constitutional affirmative defense that, based on the record, had been established as a matter of law. If there had been such a holding, the press would not have been given the strong incentive that now exists to withhold, conceal, and even destroy evidence, so as to avoid liability to individuals whose reputations have been damaged or destroyed.

New York Times should be overruled. Alternatively, its holding should be modified, so as to shift the burden of proof and thereby prevent abuse of the "actual malice" principle and injustice of the type suffered by the plaintiff in this case, when the trial court abruptly reversed the ruling that protected the plaintiff with respect to the "actual malice" issue.

II.

By Trying His Case Within the Constraints of an Erroneous Court Order, the Plaintiff Did Not "Waive" the Right to Challenge That Order on Appeal, Especially in Light of the Fact That He Had Been Irrevocably Prejudiced by the Death of the Key Witness, Who Could Never Be Cross Examined.

The defendants make little effort to defend the district court's order of September 17, 1985, on the merits, since it is difficult to justify that last minute ruling by the district court whereby the defendants were able to snatch victory from the jaws of defeat by relying on the "actual malice" rule, after years of withholding, concealing, and destroying virtually all of the evidence on the issue. Rather, defendants argue that the right to attack the order was "waived" by the plaintiff's "trial strategy." This waiver argument is invalid, since it assumes that the plaintiff could simply disregard the ruling that was to govern the trial.

An attorney faced with an adverse ruling has no choice but to proceed with his or her case. As the California Court of Appeal, in *Leibman v. Curtis*, 138 Cal.App.2d 222, 292 P.2d 270 (1955), observed:

> "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible. There is no element of waiver or of estoppel in such conduct of counsel." 138 Cal.App.2d at 225-226.

This principle was cited by the California Supreme Court in *People v. Calio*, 42 Cal.3d 639, 643, 230 Cal.Rptr. 137, 724 P.2d 1162 (1986), and seems to be widely recognized across the United States. See 4 *Am. Jur.* 2d section 248, page 743-744; 4 *C.J.S.*, section 250, page 500.

In *Hunt v. Marchetti*, 824 F.2d 916 (11th Cir. 1987), the trial court, at the second trial in a defamation case, relieved the defendant of a factual stipulation that had been made at the first trial. The Eleventh Circuit held that the order was not reversible error, since the plaintiff was not prejudiced, in that he was fully able to offer evidence concerning the subject matter of the factual stipulation. Nonetheless, the *Hunt* case is authority for the proposition that a ruling made at the beginning of trial, or before trial, that prejudices a party is certainly reviewable on appeal.

Reversible error occurs where a litigant "was prevented from or prejudiced in the presenting of his case on the merits." *Schneider v. Lockheed Aircraft Corporation*, 658 F.2d 835, 844 (D.C. Cir. 1981). Unquestionably, plaintiff DeRoburt was prejudiced, and lost the ability to present his case with respect to the "actual malice" of the defendants, when the defendants withheld, concealed, and destroyed evidence on this issue, in violation of a court order. When the trial judge inexplicably relieved the defendants of the effect of the order, the plaintiff was at that time irrevocably prejudiced, since the key witness, the supposed source of the defendants' defamatory publication, was dead, and could not be reached for cross examination.

In their opposition brief in this court, the defendants imply that the plaintiff voluntarily abandoned the presumption that there were no sources for the publication that defamed him.[1] Any such implication is absolutely false. In response to the defendants' motion to modify the presumption, the plaintiff

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[1]In their brief in this court, the attorneys for the defendants apparently delight in reliving certain factual aspects of the case, and citing their own affidavits as objective truth. They fail to distinguish between knowledge of the supposed sources of the defamatory publication, and suspicions that may have arisen based upon an extensive investigation conducted by the various attorneys representing the plaintiff, especially Mr. George M. Allen. In his petition in this court, plaintiff noted that Mr. Allen conducted an extensive investigation, and interviewed numerous individuals, one of whom was Mr. Ernest Milne, who expressly denied being a source. The defendants characterize this statement as "false." Unfortunately, the defendants did not carefully study the record when they made this charge.

It is true that, in early pretrial proceedings in 1980, Mr. Allen had listed certain particular individuals whom he had interviewed, not mentioning Mr. Milne. However, in his affidavit that was subscribed and sworn on August 29, 1985, Mr. Allen stated that he had been "continuously involved" in pretrial preparations since the ~~inception~~ of the lawsuit. He referred to Mr. Milne as "one of the numerous persons I queried *over the years* as to whether he might have been the source." (Emphasis added.) However, Mr. Milne "stated unequivocally to me in an interview devoted specifically to that purpose in 1980 that he was not the source." [C.R. 526, pages 1-7.] Obviously, although the defendants might not agree with Mr. Allen's affidavit, it does show that, some time late in 1980, he interviewed Mr. Milne, who denied being a source, even though Mr. Milne had not yet been interviewed as of the time that Mr. Allen submitted his original list of persons he had contacted, earlier in 1980. Moreover, in his affidavit of August 29, 1985, Mr. Allen specifically stated that neither he nor any of the attorneys for the plaintiff actually *knew* the identity of Mr. Cisco Uludong's purported sources. In any event, the fact that the plaintiff had to contact witnesses all over the Pacific, at great expense, in an effort to probe Mr. Uludong's state of mind, illustrates the shortcomings of the "actual malice" concept.

filed a memorandum on September 3, 1985, that requested the court to "adhere in all respects to its order regarding Cisco Uludong's undisclosed sources entered on April 12, 1982." [C.R. 538, p. 1.] In fact, it was only after the court indicated that it was going to modify the previously established presumption that the plaintiff changed his trial strategy.

When the district court decided that it would allow Mr. Uludong to rely as a "source" of what was supposedly said by someone seven years earlier who had since died, the plaintiff had no choice but to seek to discredit that "source" and the other alleged "source." It would have been futile to try to persuade the jury that Mr. Uludong had no source for his article, after the jury heard the testimony of Mr. Uludong.

Contrary to what is implied in the opposition brief, the attorneys for the plaintiff did not "know" that Jerry Kramer was Mr. Uludong's second "source" until the time of trial, when the defendants suddenly produced redacted copies of the notes that Mr. Uludong supposedly made in connection with writing his defamatory newspaper article. These notes had supposedly been "lost," but copies mysteriously surfaced when the trial date was imminent. The notes had been redacted twice, once to conceal the identity of both of the two alleged "sources," and once to conceal only the second "source," after Mr. Uludong and his employer's attorneys decided to disclose Mr. Milne, after Mr. Ernest Milne was beyond the reach of cross examination. After seeing the redacted notes and the re-redacted notes, plaintiff's attorneys were able to identify Mr. Kramer, based on the purported setting of the interview with him (at the Saipan Airport) and the number of letters that were concealed by redaction in the first and last names of the secret second "source." Mr. Kramer, of course, testified at trial and denied telling Mr. Uludong any of the defamatory things that the reporter subsequently wrote.

The defendants argue that the plaintiff's lawsuit threatened "to cripple one of the few independent newspapers in

Micronesia." [Opposition Brief, p. 9.] They fail to mention, however, that the "Pacific Daily News" was and is a part of the multibillion dollar Gannett newspaper empire. They also fail to mention that, although President of the Republic of Nauru, Hammer DeRoburt brought his case as a private litigant, one whose reputation had been sullied by the unconscionable conduct of the defendants.

When, on September 3, 1985, the trial judge announced his intention, as confirmed in his order of September 17, 1985, to revoke the order establishing the presumption that the reporter had no sources, the burden of proof on "actual malice" was thrown back on the plaintiff. He had no choice but to try to confirm the indentity of the two purported "sources" and to discredit them, even though one of them was now dead. The court's order of September 17, 1985, represented a distortion of the judicial process, and a clear illustration of the inequity of the "actual malice" rule, where the burden of proof on the issue is imposed on the plaintiff, but the defendants are able to hide the evidence successfully.

The defendants fail to mention the leading book on the practical implications of the "actual malice" rule, Renata Adler's *Reckless Disregard*.[2] In *Reckless Disregard*, the story is told how a television network and a national newsmagazine manipulated a "shield" law, concealing or revealing information so as to fit the defendants' litigation strategies, not for any legitimate purpose. In the present case, the

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[2] *Reckless Disregard* was originally published in hardcover by Alfred A. Knopf, Inc., in New York in 1986, after portions of it had appeared in *The New Yorker* magazine. It is now available in paperback from Vintage Books, a division of Random House. A shocking effort was made to prevent publication of the book by the powerful law firm that represented the defendants in the *Westmoreland* and *Sharon* cases, when that law firm threatened an action for defamation in a letter to Alfred A. Knopf, Inc. The whole sordid story of an unsuccessful intimidation attempt is described in detail at the end of the book. (See pages 231-245 of the paperback edition.)

defendants simply withheld, destroyed, and concealed the evidence of "actual malice," blatantly disregarding a court order in the process. Nonetheless, the court subsequently and inexplicably relieved the defendants of the consequences of their conduct.

By trying his case in accordance with the district court's order of September 17, 1985, the plaintiff did the best he could to establish "actual malice," but never gave up the right to challenge the erroneous order that prevented him from establishing "actual malice" by operation of law.

III.

Conclusion.

It is respectfully submitted that this court should grant certiorari to consider the important legal issues presented by petitioner Hammer DeRoburt. The law of "actual malice" is in urgent need of reform, so as to prevent an injustice in this case and in all of the other cases of plaintiffs whose reputations have been sullied by media malpractice. A wealthy and powerful press, sometimes acting with brazen disregard for the truth, should compensate those persons whose good names are unjustly taken away.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 31, 1989, I served the within *Reply to Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 31, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)